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**Draft report of the International Law Commission on the
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A. Introduction

1. At its sixty-fourth session (2012), the Commission decided to include the topic "Provisional application of treaties" in its programme of work and appointed Mr. Juan Manuel Gómez Robledo as Special Rapporteur for the topic.¹ In its resolution 67/92 of 14 December 2012, the General Assembly subsequently noted with appreciation the decision of the Commission to include the topic in its programme of work.
2. The Special Rapporteur submitted four reports from 2013 to 2016,² which the Commission considered at its sixty-fifth to sixty-eighth sessions (2013–2016), respectively. The Commission also had before it three memorandums, prepared by the Secretariat, which were submitted at the sixty-fifth (2013), sixty-seventh (2015) and sixth-ninth sessions (2017), respectively.³
3. On the basis of the draft guidelines proposed by the Special Rapporteur in the third and fourth reports, the Commission, at its sixty-eighth session (2016), took note of draft guidelines 1 to 4 and 6 to 9, as provisionally adopted by the Drafting Committee. Owing to a lack of time, it was decided to consider draft guidelines 5 and 10 at the next session.
4. At its sixty-ninth session (2017), the Commission referred draft guidelines 1 to 4 and 6 to 9, provisionally adopted by the Drafting Committee in 2016, back to the Committee, with a view to finalizing a consolidated set of draft guidelines. The Commission subsequently provisionally adopted draft guidelines 1 to 11, as presented by the Drafting Committee at the same session, with commentaries thereto.

B. Consideration of the topic at the present session

5. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/718), in which he analyzed the comments made by States and international organizations on the 11 draft guidelines provisionally adopted by the Commission at its sixty-ninth session, provided additional information on the practice of international organizations, and submitted two new draft guidelines, 5 *bis* and 8 *bis*, concerning reservations and termination or suspension, respectively, as well as eight draft model clauses.⁴ The Commission also had before it the third memorandum prepared by the

¹ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10 (A/67/10)*, para. 267.

² A/CN.4/664 (first report), A/CN.4/675 (second report), A/CN.4/687 (third report), and A/CN.4/699 and Add.1 (fourth report).

³ A/CN.4/658, A/CN.4/676 and A/CN.4/707. The consideration of document A/CN.4/707 was postponed to the present session.

⁴ The text of the draft model clauses proposed by the Special Rapporteur, in his fifth report (A/CN.4/718), excluding footnotes, reads as follows:

A. Time frame for the provisional application of a treaty

1. Commencement

Draft model clause 1

The negotiating [contracting] States [international organizations] agree to apply this Treaty provisionally from the date of signature (or any subsequent date agreed upon).

Draft model clause 2

The negotiating [contracting] States [international organizations] agree to apply this Treaty provisionally from ... [a specified date].

Draft model clause 3

The negotiating [contracting] States [international organizations] agree that the Treaty [articles ... of the Treaty] shall be applied provisionally, except by any State [international organization] that notifies the Depositary in writing at the time of signature that it does not consent to such provisional application.

Secretariat (A/CN.4/707), reviewing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application, including treaty actions related thereto.

6. At its 3402nd to 3406th and 3409th meetings, from 14 to 18 and 22 May 2018, the Commission considered the fifth report of the Special Rapporteur and the third memorandum of the Secretariat. At its 3409th meeting, on 22 May 2018, the Commission decided to refer draft guidelines 5 *bis*, 8 *bis* and the eight draft model clauses to the Drafting Committee, and instructed it to complete the first reading of the entire set of draft guidelines, including those adopted provisionally at the sixty-ninth session (2017), taking into account the comments and observations of Governments and the debate in the plenary on the Special Rapporteur's report.

7. The Commission considered the report of the Drafting Committee (A/CN.4/L.910) at its 3415th meeting, held on 31 May 2018, and adopted draft guidelines 6 [7], 7 [5 *bis*], 9, 10, 11 and 12. The Commission then proceeded to adopt the entire set of draft guidelines on provisional application of treaties, as the draft Guide to Provisional Application of Treaties, on first reading (see section C.1 below). The Commission further took note of the recommendation of the Drafting Committee that a reference be made in the commentaries to the possibility of including, during the second reading, a set of draft model clauses, based on a revised proposal that the Special Rapporteur would make at an appropriate time, taking into account the comments and suggestions made during both the plenary debate and in the Drafting Committee.

8. At its ... to ... meetings, on ... 2018, the Commission adopted the commentaries to the aforementioned draft guidelines (see section C.2 below).

9. At its ... meeting, on ... 2018, the Commission further expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, which had enabled the Commission to bring to a successful conclusion its first reading of the draft guidelines constituting the draft Guide to Provisional Application of Treaties.

Draft model clause 4

This Treaty shall be applied provisionally from the date on which a State [an international organization] so notifies the other States [international organizations] concerned or deposits a declaration to that effect with the Depositary.

2. Termination

Draft model clause 5

The provisional application of this Treaty shall terminate upon its entry into force for a State [an international organization] that is applying it provisionally.

Draft model clause 6

The provisional application of this Treaty with respect to a State [an international organization] shall be terminated if that State [international organization] notifies the other States [international organizations] (or the Depositary) of its intention not to become a party to the Treaty.

B. Scope of provisional application

1. Treaty as a whole

Draft model clause 7

A State [An international organization] that has notified the other States [international organizations] (or the Depositary) that it will provisionally apply this Treaty shall be bound to observe all the provisions thereof as agreed with the States [international organizations] concerned.

2. Only a part of a treaty

Draft model clause 8

A State [An international organization] that has notified the other States [international organizations] (or the Depositary) that it will provisionally apply articles [...] of this Treaty shall be bound to observe the provisions thereof as agreed with the States [international organizations] concerned.

10. At its ... meeting, on ... 2018, the Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft guidelines (see section C below), through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 15 December 2019.

C. Text of the draft Guide to Provisional Application of Treaties, adopted by the Commission at its seventieth session

1. Text of the draft guidelines constituting the draft Guide to Provisional Application of Treaties

11. The text of the draft guidelines constituting the draft Guide to Provisional Application of Treaties adopted by the Commission, on first reading, at its seventieth session is reproduced below.

Guide to Provisional Application of Treaties

Guideline 1

Scope

The present draft guidelines concern the provisional application of treaties.

Guideline 2

Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.

Guideline 3

General rule

A treaty or a part of a treaty may be provisionally applied, pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

Guideline 4

Form of agreement

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed through:

- (a) a separate treaty; or
- (b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

Guideline 5

Commencement of provisional application

The provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed.

Guideline 6

Legal effect of provisional application

The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

Guideline 7
Reservations

1. In accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied mutatis mutandis, a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.
2. In accordance with the relevant rules of international law, an international organization may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

Guideline 8
Responsibility for breach

The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied entails international responsibility in accordance with the applicable rules of international law.

Guideline 9
Termination and suspension of provisional application

1. The provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.
2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.
3. The present draft guideline is without prejudice to the application, mutatis mutandis, of relevant rules set forth in part V, section 3, of the Vienna Convention on the Law of Treaties or other relevant rules of international law concerning termination and suspension.

Guideline 10
Internal law of States and rules of international organizations, and the observance of provisionally applied treaties

1. A State that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.
2. An international organization that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

Guideline 11
Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties

1. A State may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the

provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

Guideline 12

Agreement to provisional application with limitations deriving from internal law of States and rules of international organizations

The present draft guidelines are without prejudice to the right of a State or an international organization to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization.
